

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 04.07.2008

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CS (OS) 1179/1997

BHIM SINGH

... Plaintiff

- versus -

SUKHBIR SINGH & ORS.

...Defendants

Advocates who appeared in this case:

For the Plaintiff : Mr Uchit Bhandari

For the Defendants : Mr N. S. Dalal

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

1. Whether Reporters of local papers may be allowed to see the judgment ?
2. To be referred to the Reporter or not ?
3. Whether the judgment should be reported in Digest ?

BADAR DURREZ AHMED, J

1. This is a suit for partition and rendition of accounts. The plaintiff claims that the following properties are joint family properties:-

- (i) No. 47 (MCD No. 8497), Arakashan Road, Pahar Ganj, New Delhi;
- (ii) Shop No. 5, Chara Mandi, Zakhira, Delhi;
- (iii) Shop known as Janta Dharam Kanta, Chara Mandi, Zakhira, Delhi; and
- (iv) Agricultural land along with built up house at village Mattan, District Rohtak (now Bahadurgarh), Haryana.

The plaintiff, at the time of filing of the suit claimed a 1/7th share in the said properties which are hereinafter referred to collectively as “the suit properties”. However, during the pendency of the suit the plaintiff’s mother (Mrs Sama Kaur), who was the defendant No. 5, passed away and consequently the plaintiff now claims a 1/6th share in the suit properties.

2. The plaintiff and the defendants 1-4 and 6 are the sons and daughter of late Mr Karan Singh and late Mrs Sama Kaur (erstwhile defendant No.5). It is stated in paragraph 1 of the plaint that the parties to the suit are legal heirs of late Mr Karan Singh who died on 26.03.1983 and that they are the joint owners in possession of the suit properties. It has been stated that agricultural land in village Mattan comprised in Khasra No. 176/164 Khatauni No. 300 and Khasra No. 319/306 Khatauni No. 450 comprise of 55 bighas and 11 biswas of land.

3. It is further averred in the plaint that after the death of Mr Karan Singh, differences had arisen between the parties to the suit on account of which it was not possible for the plaintiff to have the properties as joint properties any further. It is alleged that the plaintiff requested the defendants for partitioning of the suit properties by metes and bounds but the defendants did not agree to the same. The plaintiff also allegedly sent a notice seeking partition on 24.12.1996.

4. In paragraph 4 of the plaint it is alleged that property No. 47 Arakashan Road was purchased in the name of Mr Karan Singh from joint

family funds and that in or about 1947 the said Mr Karan Singh had migrated from his village Mattan to Delhi and started his business of selling fodder on commission basis at Pahar Ganj, New Delhi. It is averred that the plaintiff was the eldest son and started working with his father from the age of about 11 or 12 years. The plaintiff has further alleged that he used to go to the customers in connection with the business of his father. It is further alleged that the property bearing No. 47, Arakashan Road was purchased from the joint funds derived from the family income which was earned out of the crops grown on the joint family land at village Mattan and that the super-structure on 47 Arakashan Road was also raised out of joint family funds. It is also stated that the plaintiff is in possession of the portion marked in red in the site plan annexed as Annexure-A to the plaint.

5. In paragraph 5 of the plaint it is averred that the forefathers of the plaintiff and the defendants were agriculturists having about 55 bighas of land at village Mattan and that the land was originally owned by late Mr Bishan, who was the grandfather of late Mr Karan Singh, and other members of the family. It is also averred that Mr Karan Singh and other members of the family grew crops on their said land. And, out of the joint funds and income from the agricultural produce, late Mr Karan Singh purchased 47 Arakashan Road, New Delhi in which a hotel by the name of Vandana and a public Dharam Kanta are being run. The hotel is run by defendants 1-5 and the Dharam Kanta by the plaintiff.

6. Referring to suit No. 1355/1984 titled Mr Bhim Singh v. Mr Sukhbir Singh and others filed in this Court, it is stated that the suit was

disposed of on 19.03.1996 upon the direction “that unless and until the defendants 1-4 obtained letters of administration or probate, they shall not produce the will” before any authority, with reference to the property, which is the subject matter of the will. In this context it is stated that the plaintiff had not received any notice from any Court with respect to the alleged will and the plaintiff believes that the defendants have not filed any case for the grant of letter of administration or probate in respect of the said will.

7. It is then alleged by the plaintiff that the defendants who are running the hotel business are earning profits and income out of joint properties in which the plaintiff has a $1/7^{\text{th}}$ share (now $1/6^{\text{th}}$) and that the plaintiff was entitled for the said share out of the profits/ income/ rent received by the defendants 1-5 and was entitled to ask for rendition of accounts in respect thereof. It was alleged that the cause of action for the filing of the suit accrued to the plaintiff at Delhi finally on or about 03.01.1997 when the defendants received the notice dated 29.12.1996 sent by the plaintiff's lawyer demanding partition of the joint properties and because the defendants refused to accede to such demand for partition. It is in these circumstances that the plaintiff has approached this Court by way of this suit for partition of the alleged joint properties and for rendition of accounts in respect of the income/ rent/ tariff received by the defendants 1-5 from the hotel business which they were running in property No. 47 Arakashan Road, New Delhi.

8. The defendants jointly filed their written statement. They took the preliminary objection that the suit of the plaintiff is false to the

knowledge of the plaintiff and that the same is evident from the fact that a suit for partition was earlier filed by the plaintiff which was registered as suit No. 622/1984 and which is pending disposal in this Court. That suit was only in respect of partition of house No. K-95, Kirti Nagar, New Delhi. According to the defendants, this fact alone knocks out the very sub-stratum of the plaintiff's case inasmuch as it clearly indicates that the plaintiff was aware of the fact that he had no claim whatsoever in other properties which now form the subject matter of the present suit. It was contended that the present suit is hit by the provisions of Order 2 Rule 2 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC'). Under the head of preliminary objections, the defendants also stated that all the suit properties are subject matter of a will duly executed by late Mr Karan Singh on 11.03.1983 in favour of defendants 1-5 and that the defendants 2 and 4 herein have filed a petition under Section 276 of the Indian Succession Act, 1925 for the grant of probate (probate case No. 33/1997) in respect of the said will and that the probate case is pending disposal before this Court.

9. In paragraph 1 of the written statement under the head 'reply on merits', it is admitted that late Mr Karan Singh died on 26.03.1983. It is stated that the suit properties are the subject matter of the will referred to above and cannot be made the subject matter of a suit for partition. It is also stated that the plaintiff had conveniently not referred to the pendency of the suit for partition registered as suit No. 622/1984 in respect of house No. K-95, Kirti Nagar, New Delhi which is pending before this Court. It is stated that in case the plaintiff had the slightest impression that he had a right, title

or interest in respect of the suit properties, he ought to have included properties in the earlier suit for partition i.e. in suit No. 622/1984.

10. With regard to property No. 47 Arakashan Road, it is stated in the written statement that the said property is the self-acquired property of late Mr Karan Singh, who executed a will in respect of the said property and the plaintiff has no right whatsoever in respect thereto. It is stated that the said property has been entirely in the possession of the defendants except a small portion measuring approximately 20 ft. x 30 ft. abutting the road in front of the main building and a civil suit in respect thereof being suit No. 404/1983 is pending in Tiz Hazari Courts. Proceedings in that suit had been adjourned *sine die* in view of the pendency of the plaintiff's earlier partition suit bearing suit No. 1355/1984. It is further alleged that from the stage of construction of the building on the said property, the defendants 1-5 have been partners in the business carried out in the said premises under the name and style of Hotel Vandana and the plaintiff has no concern whatsoever with the said building or the business carried out by the said defendants.

11. With regard to shop No. 5, Chara Mandi, Zakhira, Delhi, it is stated by the defendants that the same is under the tenancy of defendants 3 and 4 who have been in possession of the said shop and are carrying on business and paying rent in respect thereof. It is averred that the plaintiff has no right whatsoever in respect thereto. With regard to the shop known as Janta Dharam Kanta, Zakhira, Delhi, the defendants have stated that this shop is also a tenanted premises and that the defendants 1 and 2 are the tenants and have been paying rent to the MCD, which is the owner of the

shop. It is also stated that they have been carrying on their business from the said premises and the plaintiff has no right whatsoever in respect thereto.

12. With regard to the agricultural land at village Mattan, the defendants have stated that the extent of the land is not 55 bighas and 11 biswas but is 10 kanals and 8.5 marlas. It has been denied that there is any land in Khasra No. 176/168 Khatauni No. 300. It is specifically stated that no money was ever received by late Mr Karan Singh or, after his death, by any of his legal heirs and that the agricultural land has been in actual possession of Mr Satbir, son of Mr Dig Ram, who had been dealing with the said land and at no point of time, either late Mr Karan Singh or any of his legal heirs have derived any benefit out of the said land.

13. In paragraph 4 of the written statement the defendants have denied that the property No. 47, Arakashan Road was purchased in the name of late Mr Karan Singh from the joint family funds. Though it is not disputed that late Mr Karan Singh migrated from village Mattan to Delhi and started his business at Pahar Ganj, New Delhi, it is denied that he did so on or about 1947 or that his business was of selling fodder on commission basis. It is also denied that the plaintiff rendered any assistance at the age of 11 or 12 years to late Mr Karan Singh. The defendants have also denied that the said property No. 47, Arakashan Road was purchased from the joint funds of family income which was earned out of the crops grown on the joint family land at village Mattan or that the super-structure of property No. 47, Arakashan Road was also raised out of the joint family funds. With

regard to the agricultural land and built up house at village Mattan the defendants reiterated that the same were in the possession of Mr Satbir Singh, son of Mr Dig Ram and no benefit have ever been enjoyed either by late Mr Karan Singh or the defendants herein at any point of time from the said properties.

14. The defendants have also denied that the plaintiff and the defendants were agriculturists. It was submitted that while Mr Karan Singh had been a commission agent, it was emphatically denied that any income had been received at any point of time from the agricultural produce from the land at village Mattan. It was specifically stated that the property No. 47, Arakashan Road was purchased and the building was raised thereon by late Mr Karan Singh from his own funds and that the defendants have been carrying on business under the name and style of Hotel Vandana from the very inception of the said building. It is stated that the plaintiff had no concern with the said property or the business carried on from the said property and the property also stands duly mutated in the names of defendants 1-5 and no objection till date had been raised by the plaintiff even in the earlier suit filed by the plaintiff in respect of the property No. K-95, Kirti Nagar, New Delhi.

15. The defendants denied that the plaintiff had a 1/7th (now 1/6th) share in the hotel business or any other business or in the rent/ tariff of property No. 47, Arakashan Road. The defendants submitted that the suit filed by the plaintiff is liable to be dismissed with costs and special costs as

provided under Section 35-A CPC inasmuch as the suit is false even to the knowledge of the plaintiff.

16. In the replication filed by the plaintiff the averments made in the plaint were reiterated. In respect of the suit No. 622/1984 it was stated that the property in that suit, namely, K-95, Kirti Nagar, New Delhi was owned by the plaintiff and the defendants 1-4 as owners and defendants 5 and 6 had nothing to do with the said property whereas in the present suit the properties were acquired by late Mr Karan Singh from joint family funds and the plaintiff and the defendants have joint inherited interests. Consequently, it was contended that the suit was not hit by Order 2 Rule 2 CPC. It may also be noted that in paragraph 1 pertaining to the reply on merits, the plaintiff has admitted the factum of possession with regard to property No. 47, Arakashan Road as stated by the defendants in their written statement.

17. On the basis of the pleadings, the following issues were framed on 10.09.1999:-

1. Whether the suit property is joint family property? If so, to what effect? OPP
2. What is the area of the land in village Mattan, Distt. Rohtak and to what extent thereof is it joint family property? OPP
3. Whether the property in suit was purchased/ constructed from the individual funds of late Ch. Karan Singh? OPD
4. What effect, if any, the suit No. 622/1984 have on the present suit? OPD
5. Relief.

The plaintiff produced himself as PW1 and the defendant No. 2 (Pratap Singh) came forth as DW1, being the sole witness on behalf of the defendants. It is relevant to point out that Mr Ajit Singh (defendant No.4) had also filed his affidavit by way of evidence but as he was not produced for cross-examination, his affidavit has to be disregarded. No documents, other than Exhibit PW1/2, were exhibited on behalf of the plaintiff. However, on behalf of the defendants three documents were exhibited — Exhibit DW1/P-1, Exhibit DW1/P-2 and Exhibit DW1/P-3.

Issue No.1: *Whether the suit property is joint family property? If so, to what effect? OPP*

Issue No.2: *What is the area of the land in village Mattan, Distt. Rohtak and to what extent thereof is it joint family property? OPP*

Issue No.3: *Whether the property in suit was purchased/constructed from the individual funds of late Ch. Karan Singh? OPD*

18. These issues are taken up together as they involve common points. The key issue, however, is issue No. 1 which requires a determination of the question as to whether the suit properties are joint family properties. The burden of establishing that the suit properties are joint family properties is obviously on the plaintiff. The plaintiff in his affidavit by way of evidence has stated that property No. 47 Arakashan Road; shop No. 5, Chara Mandi, Zakhira, Delhi; Janta Dharam Kanta, Chara Mandi, Zakhira, Delhi; and agricultural land measuring about 55 bighas out of 176/164 Khatauni No. 450 in village Mattan, Tehsil Bahadur Garh, District Rohtak, Haryana are joint properties of plaintiff and defendants. The said witness (PW1) has further stated that property No. 47 Arakashan

Road, Pahar Ganj was purchased by his father from the income of joint family. He has deposed that his father migrated from Mattan to Delhi in 1947 when he (PW1) was about 9 years of age and that his father started business as a commission agent and of selling of *chara* in the market at Pahar Ganj, New Delhi. It is stated that his father used to sell *chara*, which was grown in the fields at Mattan by his grandfather and other members of the family. It is also stated that theirs was a joint family and the income was joint income.

19. In paragraph 2 of the same affidavit by way of evidence, the plaintiff as PW1 stated that his grandfather Mr Sawal Singh had a huge agricultural land in village Mattan. That his father and Mr Dig Ram were brothers and they started a business of *chara* and commission agent in the fodder market at Delhi in the year 1947. The witness further stated that his uncle (*chacha*), obviously referring to Mr Dig Ram, used to grow fodder in the field and his father (Mr Karan Singh) used to sell the same in the market at Delhi. It was joint family business. It was stated that the plaintiff and the defendants had joint agricultural properties at village Mattan to the extent of 14 kanals and 13 marlas.

20. The said witness, in paragraph 3 of the affidavit by way of evidence, has stated that in 1952, his father purchased plot No. 47 Arakashan Road out of joint funds for a total consideration of Rs 14,500/- and from the said premises the plaintiff started his public Dharam Kanta in the year 1958-59 which is still running on the same plot. He further stated

that out of joint funds, a building was constructed on the said plot in the year 1976-77 and that his brothers and sister have a joint right in the said property at 47 Arakashan Road, Pahar Ganj, New Delhi.

21. In cross-examination PW1 has stated that his father came to Delhi for work and that in the year 1947 there were about 50-56 bighas of land belonging to their joint family in their village. It is further stated by PW1 that his uncle Mr Digram used to look after the property of 12-1/2 bighas belonging to his father and that it was incorrect to suggest that the said uncle retained all the income from that property, rather the income also used to come to his father. He stated further that as Mr Dig Ram has since passed away, the sons of Mr Dig Ram are presently tilling the land at village Mattan that came to his father's share. The witness (PW1) admitted that from 1947 onwards, since the time his father came to Delhi, it was his uncle Mr Dig Ram or his sons who had been tilling the land at village Mattan and had looked after the same. The witness also admitted that there had been no partition of the property belonging to his grandfather Mr Chattar Singh till date. The witness has also stated that he had not seen the share of his father's land because he had never gone there and his uncle's son is looking after the same. PW1 also admitted that he never asked for any share of the village land from his uncle nor from his uncle's sons. He stated that earlier income from that land was being sent but not any longer and it is for this reason that he asked for the income from his brothers (defendants 1-4) and mother (erstwhile defendant No.5) and his sister (defendant No. 6) as the said defendants were receiving income from that land. He further stated that

his father expired on 26.03.1983 and he never asked for his share of land at village Mattan from his uncle. The witness also stated that he did not know what is the income from the land in village Mattan as on date. He, however, stated that during his father's life time there was an annual share of income of approximately Rs 2500-3000-5000 that was received by his father in respect of that land. The said witness also admitted that his father and younger brother had started Vandana Guest House and that the plaintiff continued with the Dharam Kanta business. Significantly, the witness has admitted that he has no documentary proof to show that the said property was purchased from the joint funds brought from the village. With regard to shop No. 5, Chara Mandi, Zakhira, the witness stated in cross-examination that MCD is the owner of the said property and that he did not know as to who is paying the rent of the premises. He also admitted that till date he had not paid any rent of the said premises. With regard to the shop known as Janta Dharam Kanta, Chara Mandi, Zakhira, Delhi, PW1 admitted that the same is in the possession of Mr Balbir Singh after the death of his father and that Mr Balbir Singh pays the rent of the shop. He has also admitted that he had never been in possession of the properties, that is, shop No. 5 and the shop known as Janta Dharam Kanta.

22. As against the evidence of PW1, the defendants have filed the affidavit (Exhibit DW1/A) of defendant No. 2 (DW1) by way of evidence. In paragraph 5 of the said affidavit, DW1 has stated that property No. 47 Arakashan Road, Pahar Ganj, New Delhi was the personal and self-acquired property of his father and that he (the father) had already executed a will in

respect of the said property in his favour as well as in favour of his other brothers excluding the plaintiff. DW1 also stated that the said property No. 47 has been in his possession and that of his other brothers excluding the plaintiff, except a small portion measuring 20 ft. x 30 ft. abutting the road in front of the main building. DW1 has further stated that right from the construction of the building, he and the other defendants have been partners in the said business carried on in the said premises under the name and style of Hotel Vandana and that the plaintiff has no concern whatsoever with the said building or the said business. DW1 has also stated that shop No. 5, Chara Mandi, Zakhira was under the tenancy of defendants 3 and 4, who have been in possession of the same and are carrying on business from the said premises and are paying rent in respect thereof. The plaintiff has no concern with that shop. DW1 further stated that so far as Janta Dharam Kanta, Zakhira, Delhi is concerned, it was also a tenanted premises and defendants 1 and 2 were the tenants therein and had been paying rent to the MCD.

23. As regards the agricultural land, it was stated by DW1 that the extent of the same was only 10 kanals and 8.5 marlas . He stated that no money was ever received by his father either during his life time or by any of his legal heirs after his death from any person in respect of the land at village Mattan. He also stated that land in the said village was in possession of Mr Satbir Singh, son of Mr Dig Ram. He stated that no benefit whatsoever was derived by late Mr Karan Singh or any of his legal heirs from the said land at village Mattan. It was stated that

the said land was not sufficient even to meet the needs and requirements of Mr Satbir Singh. He stated that his father was so poor and that in search of livelihood he left the village and came to Delhi and that the properties of the father in Delhi are his personal properties out of his own earnings and not out of any benefit derived from the agricultural land at village Mattan. In his cross-examination also DW1 has reiterated what he has stated in his affidavit and what has been stated in the written statement. However, it is noteworthy that he has admitted that his father never told him about his income. He also stated that his father had not brought a single penny from the village when he came to Delhi and that firstly he had done a job in Lahore and thereafter in Delhi. He denied the suggestion that the properties were purchased by his father out of the income from the joint family properties and that none of his properties were self-acquired.

24. An examination of the pleadings and the oral testimonies of PW1 and DW1 reveals the following admitted position:- Late Mr Karan Singh, father of the plaintiff and the defendants 1-4 and 6 shifted to Delhi around 1947. In 1952 late Mr Karan Singh purchased the property bearing No. 47, Arakashan Road for a sum of about Rs 14,500/- in his own name. There is land in the village Mattan, the extent of which is not at all clear, which is jointly owned by the plaintiff and the defendants as well as other descendants of late Mr Chattar Singh (father of late Mr Karan Singh) and late Mr Bishan, grandfather of late Mr Karan Singh. Those other persons include the uncle of the

plaintiff as well as defendants 1-4 and 6, namely, late Mr Dig Ram and now his legal heirs including Mr Satbir Singh. The extent of the land at village Mattan cannot be established on the basis of evidence available on record. While at one point of time the plaintiff has stated that the land was to the extent of 55 bighas, at another point of time the land has been stated by the plaintiff himself to be of a lesser extent. DW2 has stated the extent of the land to be 10 kanals and 8.5 marlas. However, as I have indicated above, it cannot be conclusively determined as to what the extent of the land was/ is in village Mattan. This much is clear that there is some joint family land at village Mattan in which there are other co-sharers other than the parties in the present suit.

25. It has also emerged from the pleadings and the evidence on record that the land in Mattan was throughout in the possession of the plaintiff's uncle Mr Dig Ram and after his death of his son Mr Satbir Singh. However, neither Mr Dig Ram nor Mr Satbir Singh have been made parties in the present suit. It has also been established that the building standing on plot No. 47 Arakashan Road was constructed by the plaintiff's father late Mr Karan Singh in 1976. The evidence also establishes that late Mr Karan Singh, *inter alia*, had the business of a commission agent and sale of fodder in Delhi since about 1947. Late Mr Karan Singh died on 26.03.1983. Suit No. 622/1984 was filed by the plaintiff in respect of K-95, Kirti Nagar seeking partition of the same amongst the plaintiff and defendants 1-4. The said suit is now pending before the Additional District Judge, Delhi. The plaintiff has claimed co-ownership as the property had been purchased in

the name of all the five brothers i.e. plaintiff and defendants 1-4. It has also been established that after 1976 the plaintiff has his own business and the defendants have their own businesses. While in the plaint the plaintiff had claimed possession in respect of all the suit properties, it is now established that the plaintiff is only in possession of a 20 ft. x 30 ft. portion of property No. 47 Arakashan Road. He does not have any possession in respect of the said shop No. 5, Chara Mandi, Zakhira or the other shop Janta Dharam Kanta or the land at village Mattan. There is no evidence whatsoever to indicate that shop No. 5, Chara Mandi, Zakhira, Delhi was ever a part of joint family property. The same is the situation with regard to the shop known as Janta Dharam Kanta. Admittedly, those properties are tenanted in respect of which defendants 3-4 are tenants in one and defendants 1 and 2 are tenants in the other, the plaintiff having no right, title or interest in either.

26. This leaves for discussion the property of 47 Arakashan Road. It has been alleged by the plaintiff that it was acquired from funds derived from the land at Mattan which was joint family property. The onus of proving this fact is on the plaintiff. In my view that burden has not been discharged by the plaintiff. It was attempted to be argued on behalf of the plaintiff that the Finance Act, 1948 prescribed that up to an annual income of Rs 1,500/- no income tax was payable. Since there is no income tax record with regard to the plaintiff's father (late Mr Karan Singh), it was sought to be contended that his income was below the taxable limits. In other words, it is sought to be inferred that Mr Karan Singh's income was

less than Rs 1,500/- per year. If this were to be so, then even assuming that the entire income was used for the purchase of the property in 1952, the only available funds with the plaintiff's father would have been Rs 7,500/- (Rs, 1,500/- x 5; for the years 1947- 1952). It was contended that it is obvious that the entire sum could not have been spent for the purchase of the plot inasmuch as some amount must have been spent on the upkeep of the family. A reference was made to PW1's statement in cross-examination that a sum of Rs 5,000/- was brought by late Mr Karan Singh from the village and a further sum of Rs 5,000/- was brought by his uncle Dig Ram. Consequently, it is sought to be inferred that a sum of Rs 10,000/- was availed from the rural land income. Therefore, a major portion of the sum of Rs 14,500/-, which was spent for the purchase of the property, came from the joint family funds derived from the joint family property at village Mattan. The decision in the case of **Appasaheb Peerappa Chandgade v. Devendra Peerappa Chandgade & Ors.**; AIR 2007 SC 218 was also pressed into service by the learned counsel for the plaintiff to submit that if it is shown that a family possesses joint family property, the burden shifts on the defendants. Reliance was also placed on **M. R. Rajasekharappa v. H. N. Siddananjappa**; ILR 1990 KAR 2303 to submit that jointness is a normal condition of Hindu Society and that if the nucleus is formed by joint family then the presumption is of joint family. It was contended that Rs 10,000/- was the nucleus which was derived from the land in the village and, therefore, the presumption of a joint family property can be drawn.

27. With regard to the argument based on the factum that there is no

income tax record of the plaintiff's father (late Mr Karan Singh), I may observe straightaway that it is too inferential and based on far too many surmises. It is not necessary that if there is no income tax record of the plaintiff's father, that, in point of fact, the plaintiff's father did not pay any income tax. In any event, it cannot be inferred that because the plaintiff's father does not have an income tax record, his income was necessarily below the taxable limit. He may have defaulted in payment of income tax. Furthermore, the statement of PW1 in his cross-examination with regard to the sums of Rs 5,000/- brought from the village and by his uncle Dig Ram do not find any mention in the pleadings. There is nothing to show that what he has stated is in fact the truth or that it is even inferentially the truth. The fact of the matter is that the plaintiff has not been able to discharge the burden of establishing that property No. 47 Arakashan Road was a joint family property.

28. It is also important to note that while the village land is stated to be joint family property, not all the members of the joint family have been included in the present suit. Admittedly, the village land also belonged to other members of the family such as Mr Dig Ram and his legal heirs as also to all descendants of late Mr Bishan and late Mr Chattar Singh, who were the grandfather and father of late Mr Karan Singh respectively. The learned counsel for the defendant is right in saying that if the suit properties are claimed to be joint family properties, then why have the other descendants of the grandfather not been made parties? It is clear that in a partition suit all the co-sharers are necessary parties. In the absence of any necessary

party, no effective order or decree can be passed. In view of the provisions of Order 1 Rule 9 it is clear that non-joinder of a necessary party would be fatal to the suit. This aspect of the matter has also to be borne in mind. The plaintiff has not been joined necessary parties and has taken the risk by not doing so. In the absence of necessary parties, no effective order or decree can be passed and the plaintiff must bear the consequences of his adventure. Non-joinder of necessary parties in a partition suit is fatal.

29. It must also be noted that the stand taken by the plaintiff in the legal notice dated 24.12.1996 (Exhibit PW1/2) and that in the present suit are contradictory. In paragraph 2 of the said notice dated 24.12.1996 (Exhibit PW1/2) it is stated that :-

“2. In or about 1947, Mr. Karan Singh came to Delhi and my client being the eldest son, helped and started doing business with his father who was a Commission Agent at the start of the business. By the joint efforts of Mr. Karan Singh and my client they developed business and expanded the same, by the result, apart from village property, they purchased property No.47, Arakashan Road, Pahar Ganj, New Delhi in 1952 and constructed a Hotel in 1976. Similarly Shop and Dharam Kanta are the joint properties of all the legal heirs left behind Late Karan Singh.”

There is no whisper of joint funds from agricultural land in the said notice. The tenor of the notice is that since the plaintiff and his father Mr Karan Singh did business jointly and through their joint efforts they purchased the property No. 47 Arakashan Road, the plaintiff was entitled to the same both on account of the joint efforts put in by him as well as being a legal heir of late Mr Karan Singh. The thrust of the pleadings in the suit as well as the evidence which has sought to be led on the part of the plaintiff is that

property No. 47 Arakashan Road was purchased out of funds derived from the income from agricultural land at village Mattan. The two are clearly contradictory. There are other contradictions in the plaintiff's case. For example, in paragraph 2 of the affidavit by way of evidence of PW1 it is stated that the plaintiff's father and Mr Dig Ram started business in 1947. However, this is not mentioned in the plaint. Then it has been stated by PW1 that his uncle used to look after his father's land but neither Mr Dig Ram nor any member of his family has been produced in the witness box.

30. Upon a consideration of the pleadings, the evidence and the arguments advanced on behalf of the parties, as discussed above, I decide issues 1, 2 and 3 as under:-

Issue No. 1: *Whether the suit property is joint family property?*

If so, to what effect? OPP

No, insofar as the property No. 47 Arakashan Road; shop No. 5, Chara Mandi, Zakhira, Delhi; and the shop known as Janta Dharam Kanta are concerned. As regards the land in village Mattan, the same has been considered in issue No. 2 below.

Issue No. 2: *What is the area of the land in village Mattan, Distt.*

Rohtak and to what extent thereof is it joint family property? OPP

There is some land in village Mattan which is joint family property but the area cannot be determined on the basis of the evidence on record. Moreover, all the members of the joint family property pertaining to that land have not been made parties to the present suit.

Issue No. 3: *Whether the property in suit was purchased/constructed from the individual funds of late Ch. Karan Singh? OPD*

This issue, apparently, pertains to property No. 47 Arakashan Road. It has been held that the plaintiff has not been able to establish that the same was purchased out of joint family funds. Therefore, it has to be held that the property was purchased from individual funds of late Mr Karan Singh.

Consequently, all the three issues are decided against the plaintiff.

Issue No. 4: *What effect, if any, the suit No. 622/1984 have on the present suit? OPD*

31. This issue has been framed at the instance of the defendants on the plea taken on the basis of the provisions of Order 2 Rule 2 CPC. Suit No. 622/1984 is a partition suit in respect of property No. K-95, Kirti Nagar, New Delhi. According to the defendants since the plaintiff had the purported right to seek partition of other properties which now form the subject matter of the present suit, the plaintiff ought to have included those properties in the said suit No. 622/1984 and claimed partition in respect thereof also. The fact that the plaintiff did not do so and also did not take any leave of the Court for filing a separate suit in respect of the present suit properties, the plaintiff cannot be permitted to file the present suit. The plea taken by the plaintiff is that suit No. 622/1984 is not based upon joint family property under Hindu law. It is contended that the properties in the said suit was purchased jointly by the plaintiff and the defendants 1-4 in their names. The cause of action in that suit is different from the cause of action in the present suit.

32. In my view this issue does not call for determination because of the view taken by me on issue Nos. 1, 2 and 3. The suit has to fail on the conclusions arrived at in respect of the issue Nos. 1, 2 and 3 and, therefore, this issue would become redundant.

Issue No. 5: *Relief.*

33. In view of the conclusions arrived at in respect of issue Nos. 1, 2 and 3, the plaintiff is not entitled to any relief. The suit is dismissed with costs.

**BADAR DURREZ AHMED
(JUDGE)**

**July 04, 2008
SR**